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Nos. 621 and 622

In the Supreme Court of the United States

OCTOBER TERM, 1958

STATE OF NEW JERSEY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

COUNTY OF BERGEN, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

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INDEX

	Page
Statement	1
Argument	6
Conclusion	14

TABLE OF CASES

Adams Express Co. v. *Croninger*, 226 U.S. 491	9–10
Bethlehem Steel Co. v. *N.Y. State Labor Relations Board*, 330 U.S. 767	9
Board of Public Utility Commissioners v. *United States*, 158 F. Supp. 98	3
Board of Public Utility Commissioners v. *United States*, 158 F. Supp. 104	5
Bullock v. *Railroad Commission of Florida*, 254 U.S. 513	11–12
Chicago v. *Atchison, T. & S.F. Ry. Co.*, 357 U.S. 77	9
Colorado v. *United States*, 271 U.S. 153	9, 10, 11
Erie Railroad Company Ferry Abandonment, 295 I.C.C. 549 and 599	5, 6
Frozen Food Express v. *United States*, 351 U.S. 40	13
Jay v. *Boyd*, 351 U.S. 345	10
Louisville & Nashville R.R. v. *Motley*, 211 U.S. 467	11
Lucking v. *Detroit & Cleveland Navigation Co.*, 265 U.S. 346	12
Massachusetts v. *Mellon*, 262 U.S. 447	11
New York v. *United States*, 257 U.S. 591	11
New York Central Railroad Company Ferry Abandonment, 295 I.C.C. 385 and 519	3
New York Central R. Co. v. *Hudson County*, 227 U.S. 248	9
Panama Canal Co. v. *Grace Line, Inc.*, 356 U. S. 309	13
Southern Pacific Co. v. *Arizona*, 325 U.S. 761	9
Texas v. *United States*, 292 U.S. 522	11
United States v. *Los Angeles & S.L. R.R. Co.*, 273 U.S. 299	13

494305—59

STATUTES

	Page
Administrative Procedure Act, Section 10 (5 U.S.C. 1009)	
Interstate Commerce Act (49 U.S.C. 1, et seq.):	
Section 1(18)	3, 8
Section 13 (1) and (2)	8
Section 13a	3
Section 13a (1) and (2)	3–4, 7, 8, 9, 13
Section 15 (7)	8
Transportation Act of 1958, P.L. 85–625, Sec. 5	3
28 U.S.C. 1331	2
28 U.S.C. 1336	2, 12
28 U.S.C. 2282	2
28 U.S.C. 2325	2

MISCELLANEOUS

S. Rep. No. 1647, 85th Cong., 2d Sess	6

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellees United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

These are direct appeals by the State of New Jersey and the Board of Public Utility Commissioners of

the State of New Jersey (No. 621), and by a group of communities and a commuters' association (No. 622) from the judgment of a three-judge district court dismissing their complaints. The complaints sought relief on alternative theories: (1) invoking the jurisdiction of the district court under 28 U.S.C. 1331 and 2282, appellants sought to enjoin New York Central from discontinuing its railroad passenger ferry service between Weehawken, New Jersey, and New York City, pursuant to Section 13a(1) of the Interstate Commerce Act, on the ground that this section is unconstitutional; (2) invoking the jurisdiction of the district court under 28 U.S.C. 1336 and 2325 to review orders of the Interstate Commerce Commission, appellants asked the court to direct the Commission to institute an investigation into the proposed discontinuance of ferry service. On September 12, 1958, the court granted a preliminary injunction restraining the New York Central from discontinuing the service.

On November 3, 1958, the three-judge court, with Judge McLaughlin dissenting, rendered its opinion holding that Section 13a(1), both on its face and as it had been applied, is a valid exercise of the commerce power of Congress, and that the court was without power to require the Commission to institute an investigation pursuant to Section 13a(1). The court, however, continued in effect, pending appeal to this Court, the injunction against discontinuance of the ferry service.

The prior administrative and judicial proceedings under Section 1(18) of the Interstate Commerce Act. New York Central's trans-Hudson ferries here involved are the same railroad passenger ferries as were

involved in *New York Central Railroad Company Ferry Abandonment,* 295 I.C.C. 385 and 519. In that proceeding, after extensive hearings, the Interstate Commerce Commission authorized the carrier to discontinue these passenger ferries on the theory that the passenger ferries, operating on different routes than New York Central's trans-Hudson freight services which were to continue in operation, constituted a separate and distinct line of railroad subject to abandonment with the Commission's authorization pursuant to Section 1(18). In a suit brought by the present appellants, the court below held that the discontinuance of the passenger ferry service would not constitute an abandonment of a line of railroad subject to the Commission's jurisdiction under Section 1(18), but only a partial discontinuance of service over which the Commission admittedly then had no jurisdiction. *Board of Public Utility Commissioners* v. *United States,* 158 F. Supp. 98. The judgment in that case was appealed to this Court which, on June 16, 1958, noted probable jurisdiction. 357 U.S. 917. There is pending in that case (No. 41, this Term) a motion to defer further proceedings until these appeals have been decided.

The administrative and judicial proceedings in this case. On August 12, 1958, the Transportation Act of 1958 became effective. Section 5 of that Act added to the Interstate Commerce Act a new Section 13a giving for the first time to the Interstate Commerce Commission jurisdiction with respect to discontinuance or change in the operation of trains and ferries (as distinguished from the total abandonment of a line of railroad), both interstate (subsection (1)) and intrastate (subsection (2)). Section 13a(1) pro-

vides that if the rights of a railroad subject to Part I of the Act with respect to the discontinuance or change of the operation or service of any interstate train or ferry are subject to State law or regulation, the railroad may file with the Commission, mail to the Governor of each State in which the train or ferry is operated, and post in every station served thereby, a notice at least 30 days in advance of the proposed discontinuance or change. Upon the filing of the notice, the Commission may within 30 days institute an investigation of the proposed discontinuance or change; the Commission may also, if it decides to investigate, within 20 days require continuance of the service pending its investigation, but not for longer than four months. If, after hearing in such investigation, the Commission finds that the operations proposed to be discontinued are required by public convenience and necessity and will not unduly burden interstate or foreign commerce, it may order their continuance or resumption for a period of not more than one year. However, if the Commission takes no action, the railroad may discontinue or change the service in accordance with the notice.

On August 13, 1958, the New York Central filed, mailed, and posted a notice that on September 13 it would discontinue the operation of its passenger ferries across the Hudson River between New Jersey and New York City. Thereafter, the appellants filed with the Commission separate complaints objecting to the proposed discontinuance of ferry service and requesting the Commission to institute an investigation and to require continuance of the service pending

such investigation. On August 26, 1958, the Commission released a notice stating:

> The Commission, upon consideration of the matters involved, including consideration of the records in Finance Docket No. 18781 (*New York Central R. Co. Ferry Abandonment,* 295 I.C.C. 385 and 519) and Docket No. 32359 (*Fares and Charges via Weehawken Ferry*), has concluded not to enter upon an investigation of the proposed discontinuance or otherwise to require that such ferry service be continued, in whole or in part.

On September 2, 1958, the Commission issued an order instituting an investigation with respect to New York Central's proposed discontinuance of ferry service "solely to determine the conditions, if any, which should be imposed for the protection of employees affected thereby," and denied reconsideration of its prior ruling in all other respects. The present actions were commenced by the appellants in the court below on September 4, 1958.[1]

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[1] The various proceedings with respect to New York Central's trans-Hudson ferries were paralleled by similar proceedings with respect to the Erie Railroad's passenger ferry between Jersey City and New York City. Thus, the Commission's order in *Erie Railroad Company Ferry Abandonment*, 295 I.C.C. 549 and 599, authorizing abandonment of Erie's ferry pursuant to Section 1(18), was set aside by the three-judge court below in *Board of Public Utility Commissioners* v. *United States*, 158 F. Supp. 104. This Court noted probable jurisdiction in Erie's appeal from that judgment on June 16, 1958. 357 U.S. 917. Similarly, on August 14, 1958, Erie also filed a notice for proposed discontinuance of this same ferry pursuant to Section 13a(1), and the Commission determined not to institute an investigation. The appellants in No. 621 made the same challenge to Erie's discontinuance of its pas-

ARGUMENT

The Transportation Act of 1958 was the result of extensive hearings in 1957 and 1958 by subcommittees of the Senate and House Committees on Interstate and Foreign Commerce. By 1958 the railroads had lost most of their passenger business (both inter-city and commuter) to other forms of transportation. The committee reports on the Act pointed out that the railroads were in a "poor financial position" due in large measure to "the general passenger deficit" (S. Rep. No. 1647, 85th Cong., 2d Session., pp. 8, 9); that a major cause of this precarious condition was the serious problem of "difficulty and delay" in discontinuing or changing uneconomical passenger services which "constitutes a heavy burden on interstate commerce" (*id.* p. 21); and "that State regulatory bodies all too often have been excessively conservative and unduly repressive in requiring the maintenance of uneconomic and unnecessary services and facilities" (*id.* p. 22).

To deal with this situation, Congress in Section 13a(1) adopted a summary procedure for discontinuance of uneconomical interstate train and ferry services. No prior Commission approval for such

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senger ferry service as they made in the instant case with respect to the New York Central ferry service. However, in dismissing the present appellants' complaints in the *Erie* case the court below refused to continue pending appeal the preliminary injunction which it had previously granted against Erie's discontinuance of ferry service. As a result, Erie has discontinued its passenger ferry service. Accordingly, unless the appellants perfect an appeal in the subsequent *Erie* case it would appear that both that case and the pending prior appeal will become moot.

discontinuance is required: discontinuance is left to the discretion of carrier management, which is required only to give 30 days notice thereof; and the Commission is given only a limited and temporary veto power. See *supra*, pp. 3–4. This expedited procedure stands in sharp contrast to the provisions in Section 13a(2) governing the discontinuance or change of the operations of intrastate trains or ferries. Intrastate operations may be discontinued only pursuant to specific "authority" granted by the Commission after "full hearing" and upon finding (1) that public convenience and necessity permits such discontinuance or change and (2) that continued operation of the trains or ferries would unduly burden interstate commerce.

1. The court below correctly held that appellants had no statutory right to a hearing before the ferry service was discontinued. Section 13a(1) does not require that a hearing be held upon the complaint of any State or users before an interstate train or ferry service is discontinued or changed. Rather, Congress provided that "the Commission *shall have authority* * * *, either upon complaint or upon its own initiative without complaint, to enter upon an investigation," and that "Upon the institution of such investigation, the Commission, * * * *may require*" continuance of the service pending the investigation (but not for longer than four months). (Emphasis added.) Upon its face, as the court below held, Section 13a(1) empowers, but does not require, the Commission in its discretion to investigate.

Appellants urge that the phrase "shall have authority" to investigate must be equated with the Commission's obligations to investigate rate complaints under Section 15(7), which also uses the words "shall have authority". The court below contrasted the interests involved in the lawfulness of carrier rates with those involved in a discontinuance of service, and concluded (J. St. 59) [2] that

> Section 13a(1) embodies a new and distinct exercise of the congressional power. Its language is clear and unambiguous and therefore neither admits of nor requires any construction by comparison with any other section or subsection of the Interstate Commerce Act, as amended.

In so holding, the court below correctly recognized that to import into Section 13a(1) the hearing requirements of other provisions of the Act would destroy the expeditious procedure which Congress specifically provided to deal with this urgent problem.

Appellants further seek to rewrite the special procedures of Section 13a(1) into an application and prior hearing procedure (as in Sections 1(18) and 13a(2)) by urging that the general complaint and investigation provisions of Section 13(1) and (2) should be read into Section 13a(1) so as to require, whenever demanded by a State or user, a hearing *prior* to a service discontinuance. Again, giving effect to the clear and urgent purpose of Congress, the court below held: "The patent difference between the situa-

[2] We use the abbreviation "J. St." to refer to the jurisdictional statement in No. 621, and the abbreviation "J. St. (622)" to refer to the jurisdictional statement in No. 622.

tions and procedures contemplated and prescribed in old Section 13 and new Section 13a(1) eliminates any ground for a similarity of treatment" (J. St. 47–48).

2. There is no merit to appellants' contention that Section 13a(1) violates the due process clause of the Fifth Amendment if it is construed as authorizing the discontinuance of an interstate train or ferry service without requiring a prior hearing before the Commission upon the demand of a State or of users of the service.

The power of Congress to provide for exclusive Federal regulation of the discontinuance of interstate train and ferry service was settled by *Colorado* v. *United States,* 271 U.S. 153, and is conceded by the appellants (J. St. 14–16). See also *New York Central R. Co.* v. *Hudson County,* 227 U.S. 248.

Similarly, the power of Congress to determine that in the absence of affirmative Federal action some aspect of interstate transportation shall be left to the managerial judgment of the carriers, is beyond dispute. Thus, state action is precluded "where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute". *Bethlehem Steel Co.* v. *N.Y. State Labor Relations Board,* 330 U.S. 767, 774; *Chicago* v. *Atchison, T. & S.F. Ry. Co.,* 357 U.S. 77. See, generally, *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 769–770. Stated otherwise, Congress is empowered to alter in the light of changing conditions the common law and statutory service obligations of interstate railroads. *Adams Express Co.*

v. *Croninger,* 226 U.S. 491; *Colorado* v. *United States, supra.*

We believe it is obvious that Congress could have provided that the discontinuance of interstate trains or ferries shall rest solely in the railroads' managerial discretion, and that in such case no hearing prior to discontinuance would be required. We are aware of no principle of law, nor have appellants cited any, which prohibits Congress from empowering the Commission, in the public interest, to determine without a hearing whether to investigate the proposed discontinuance or to allow it to take effect. Where Congress has thus placed the decision to act or not to act solely in the discretion of an administrative body, there is no constitutional right to a hearing. *Jay* v. *Boyd,* 351 U.S. 345, 352–356.

Clearly, the appellant State and Board have no interest protected by the due process clause of the Fifth Amendment. Even assuming that, absent Federal legislation, the State could require continuance of wholly interstate ferry service between New Jersey and New York, that power, as the Court below held (J. St. 42–45), could not survive the valid exercise of Federal power in Section 13a(1). The State's suggestion that it has such rights and duties in the protection of the public as entitles it to a continuation of the service regardless of the burden upon the railroad or upon interstate commerce (*id.,* 19) is without merit. *Colorado* v. *United States, supra,* 271 U.S. 153, 163, 165–166. Nor is its position better if regarded as the representative of its citizens. *Massachusetts* v. *Mellon,* 262 U.S. 447.

Appellants' suggestion that the State has rights, derived from the railroads' State franchises, to a continuation of the ferry service which entitles it to a hearing (J. St. 20) was correctly rejected by the court below, which held that Section 13a(1) "extinguishes * * * any other public rights which may have resulted from the initial grants of ferry franchises and the acceptance and user thereof by the defendant railroad and its predecessors" (*id.*, 54). This Court has repeatedly held that the obligations of interstate railroads under State charters are superseded by the exercise by Congress of its power to regulate commerce. *Colorado* v. *United States,* 271 U.S. 153, 165–166; *New York* v. *United States,* 257 U.S. 591, 600–601; *Texas* v. *United States,* 292 U.S. 522, 530–531.

Finally, the appellant State urges (J. St. 20): "The users of the service have common law rights in the service as third party beneficiaries of the franchise contracts." The court below correctly held that any such rights of the users of the service terminated with the rights of the State (J. St. 54). Even if each user of the ferry service had a personal contract with the railroad for its continuance, such contract rights would have been extinguished when Congress enacted Section 13a(1). *Louisville & Nashville R.R.* v. *Mottley,* 219 U.S. 467. Also, as the court below recognized, users of train or ferry service have no common law right to continuance of the service at a loss. *Bullock* v. *Railroad Commission of*

Florida, 254 U.S. 513, 520–521; *Lucking* v. *Detroit & Cleveland Navigation Co.*, 265 U.S. 346, 350–352.[3]

3. The court below correctly held that the Commission's determination not to investigate the railroad's proposed discontinuance of the ferry service is not subject to judicial review.

a. The court below properly ruled that there was before it no "order" of the Commission within the meaning of 28 U.S.C. 1336, which confers jurisdiction to "enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission." As the court noted, the Commission's notice of August 26, 1958 "was nothing other than an announcement that the Commission intended to take no action with respect to the railroad's notice of intention to discontinue the ferries" (J. St. 38). Under the statute, the Commission does not "authorize" discontinuance of the ferry service; its notice, therefore, was simply to inform the public that it had decided not to investigate. The Commission's order of September 2, 1958, merely instituted a limited investigation under Section 13a(1) "solely to determine the conditions, if any, which should be

[3] The intervening appellants, but not the appellant State and Board, contend that Section 13a(1) constitutes an invalid delegation of legislative power "in that no legislative standard is provided to guide the Interstate Commerce Commission in its determination not to hold an investigation" (J. St. (622), 23 ff.). But in determining whether to investigate, the Commission obviously is to be guided by the same standards which govern its decision whether (if it does investigate) to direct restoration or continuance of the service—"public convenience and necessity," and "undue burden on interstate commerce," applied in the light of the National Transportation Policy. Appellants concede (*id.*, 25) that these standards are adequate.

imposed for the protection of employees affected thereby," and denied rehearing of its prior ruling. Neither of these documents required or prohibited action by any person within the meaning of *United States* v. *Los Angeles & S.L. R.R. Co.*, 273 U.S. 299, 310, or foreshadowed enforcement proceedings as in *Frozen Food Express* v. *United States*, 351 U.S. 40.

b. The relief sought by appellants (assuming the constitutionality of Section 13a(1)) was that the district court direct the Commission to institute an investigation respecting discontinuance of the ferry service. However, the court found that "the statute under review expressly commits to the discretion of the Commission the determination of whether or not it will investigate any complaint which is evoked by a carrier's notice of intention to discontinue" (J. St. 39). Accordingly, it held that the case is within the exception to the judicial review provisions of Section 10 of the Administrative Procedure Act (5 U.S.C. 1009) covering "agency action [which] is by law committed to agency discretion." We submit that this ruling is plainly correct. The Commission's decision not to institute an investigation into the proposed discontinuance of ferry service is no less committed to agency discretion than the determination by the Panama Canal Co. not to institute a proceeding for readjustment of the tolls of the Panama Canal. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317.

c. If the Commission's decision not to institute an investigation were subject to judicial review, appellants would have to show an abuse of discretion. They have not done so. In its notice of August 26, 1958, the Commission stated that its determination

not to investigate took into account the records in the prior New York Central ferry abandonment case, and in the pending proceedings involving fares and charges for the Weehawken ferry (Docket No. 32359). Thus, the Commission's decision was made with the benefit of an evidentiary record containing the pertinent facts with respect to the ferries proposed to be discontinued.[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court is so clearly correct that it should be affirmed without further briefs or oral argument.

J. LEE RANKIN,
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JANUARY 1959.

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[4] The intervening appellants further contend (J. St. (622) 12–14) that New York Central violated the notice provisions of Section 13a(1) by filing a single notice of the proposed discontinuance of its Weehawken passenger ferry service, instead of a separate notice for each vessel used in that service. But there is nothing in Section 13a(1) which requires that a separate notice be filed for each boat. The purpose of the notice provision is to inform the interested agencies and members of the public. The notice here filed adequately served that function; separate notices would more likely have tended to confuse than to inform. Moreover, New York Central's notice was filed on August 13, 1958, while the Commission's notice regulations, relied on by intervening appellants, were not published in the Federal Register until August 20, and did not become effective until August 29.

U. S. GOVERNMENT PRINTING OFFICE 1959